Supreme Court, U.S.
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No. 98-1952

IN THE

Supreme Court of the United States

MARATHON OIL COMPANY,

Petitioner,

v.

BRUCE BABBITT, Secretary of the United States Department of the Interior, UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, *et al.*,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

PATRICK G. PITET
Region Counsel
MARATHON OIL COMPANY
1501 Stampede Avenue
Cody, WY 82414-4721
(307) 527-3275

CRAIG R. CARVER
Counsel of Record
DON H. SHERWOOD
ALFERS & CARVER, LLC
730 17th Street
Suite 340
Denver, CO 80202
(303) 592-7674

Attorneys for Petitioner

154739

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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INTRODUCTION

The government's opposition brief acknowledges that the sole question presented by this petition concerns Marathon's standing.

The government presents three responses to this single question. First, it evades the issue altogether by asserting that the case is not ripe for review by this Court. Second, it contends (at p. 7) that even if the decision is ripe for review, this Court "need not devote its time to addressing what is, even accepting petitioner's arguments, merely a single erroneous unpublished decision." Third, it argues (at p. 9) that even though the Secretary unlawfully based his action on an unpublished policy, following "a judicial ruling setting aside its prior decision, BLM would be free to decide not to lease the lands based on another, lawful ground." This reasoning is used as the basis for contending that Marathon's claims are "not redressable" and therefore nonreviewable by any court.

The government's brief approves of, and explains how the circuit court's decision in this case utilizes this Court's "redressability" prong of the standing test. Under the rationale of the government and the Tenth Circuit, no longer is it important to determine whether an agency acted legally. Instead, the focus shifts to the hypothetical inquiry of whether there might have been a legal way for the agency to have reached the same result. If the answer to this question is in the affirmative, then no one possesses standing to challenge even an admittedly illegal action.

The government's brief (at p. 4) describes the circuit court's decision in this case as relying on "prior circuit precedent, which held that plaintiffs lacked standing to challenge the Secretary of the Interior's authority over the disposition of federal lands because their injuries were not redressable by a favorable judicial decision." Contrary to the government's contention that this petition presents only a single erroneous decision, this statement

concedes that at issue is the latest of a line of Tenth Circuit decisions that serve to insulate the Secretary's discretionary decisions from judicial review. As pointed out by the government's brief, the result is that in the Tenth Circuit most of the Secretary's land use decisions are now immune from judicial review.

This is a radical development, one that has come about because of the Tenth Circuit's misapplication of this Court's redressability test. The government's opposition brief not only acknowledges this trend, it seeks to extend it by asserting that this Court's redressability test "resembles" section 701(a)(2) of the APA in that it makes all discretionary agency decisions "not subject to judicial review." By acknowledging and advocating so fundamental a change in the relationship of the three branches of government, the Opposition Brief emphasizes exactly why this case does indeed warrant this Court's review.

ADMISSIONS AND OMISSIONS IN THE GOVERNMENT'S "STATEMENT"

The "Statement" portion of the government's Opposition Brief contains a number of admissions against interest, but it omits significant facts necessary to put those admissions into proper context. At its core, the government's brief admits that the BLM's decision in this case was based solely upon a request submitted by the Colorado Environmental Coalition (CEC). It further admits that the decision is designed to evaluate whether to include additional acres within wilderness study areas (WSAs) *after* expiration of the 15-year wilderness selection deadline dictated in Section 603 of FLPMA (43 U.S.C. § 1782).[1]

1. The Department's own review board, the IBLA, has concluded that: "the time for taking an appeal from BLM's decisions that [certain] areas were not suitable for designation as WSA's has long since passed. Accordingly, we conclude that the doctrine of administrative finality precludes Appellants [the CEC] from now challenging those decisions." *Colorado Environmental Coalition*, 149 IBLA 154 (June 10, 1999).

The government's Statement further admits that Marathon was ambushed by the Secretary's unpublished policy when it claims (at p. 3) that BLM's 1996 decision against Marathon was made "[i]n order to remain consistent with its May 1997 policy of protecting the wilderness option. . . ."

In describing events that post-date the district court's dismissal of Marathon's case, the government concedes (at p. 6) that the IBLA has concluded that the BLM's decision should be set aside and remanded because it was arbitrary, capricious, or otherwise contrary to law. However, it incorrectly asserts (at p. 5) that "on remand, BLM initiated the analysis ordered by the IBLA." In fact, over a year and a half after remand, Marathon submitted a Freedom of Information Act request to BLM, asking that it provide to Marathon "all documents which relate, discuss or refer to the IBLA's remand of the case of *Marathon Oil Co., 139 IBLA 347.*" In response, on February 19, 1999 the BLM wrote: "No actions have been taken referencing this IBLA's remand." That statement remains true today.

The government's Statement also mischaracterizes an order issued on May 26, 1999 in IBLA docket No. 99-133 as "dismissing the appeal as unripe until BLM has had time to complete the land-use planning process." That decision actually concluded by noting: "In effect, Marathon seeks a mandamus directing BLM to comply with our earlier decision. This Board lacks authority to take such action." The IBLA then pointed out in a footnote that under 28 U.S.C. § 1361 only the district court has jurisdiction of any action in the nature of mandamus.

Thus, the full truth of the matter is that the Secretary's own appeal board has held that BLM's actions in this case are arbitrary, capricious and contrary to law. That Board has then further acknowledged that it is powerless to require the BLM to conform to its decision, and has agreed with Marathon that

its sole remedy for addressing such lawless behavior is with the district court. The district court has, of course, found that Marathon lacks standing. Thus, unless that decision is reversed by this Court, the result will be that no one will be able to require the Secretary's land use decisions to conform to law.

As the government's opposition brief points out in its Argument section, this result is its overall goal. Although public lands decisions in general, and oil and gas leasing decisions in particular have routinely been reviewable and reviewed by federal courts in literally thousands of cases, the government now contends (at p. 10, n.5) that this Court's "redressability" test should be used to commit such decisions to agency discretion by law and "therefore not subject to judicial review."

This amounts to an attempt to free the Secretary from all controls imposed upon him by Congress or the courts.

THE GOVERNMENT RELIES UPON THE TENTH CIRCUIT'S USE OF THE "REDRESSABILITY" TEST TO ELIMINATE REVIEW OF DISCRETIONARY ACTIONS

The government's substantive responses to the single standing issue raised by the petition consist of three arguments, the cumulative effect of which is designed to utilize the Tenth Circuit's decision as the basis for avoiding review not only of this BLM decision, but of innumerable future decisions as well.

First, the government contends that since the Secretary's decision in this case "did not permanently bar leasing," on the properties sought by Marathon, it is not judicially reviewable. In the government's view, so long as the Secretary denominates an action as one that "reevaluates" land usage, such a decision is "not action taken pursuant to FLPMA, whose requirements do not even apply to limitations on leasing." As this argument

has found favor in the Tenth Circuit, the Secretary has — as in this case — increasingly utilized the simple expedient of labeling his decisions as non-permanent as the means of avoiding judicial review of virtually all his actions.

The government cites no law to support its position, because there is none. In general, the law is that "even an interim rule expected to be in place for only a brief time is subject to review, or agencies would be free to act unreasonably for that time." *Competitive Telecommunications Ass'n v. Fed. Communications Comm'n*, 87 F.3d 522, 531 (D.C. Cir. 1996) (citation omitted). In particular, FLPMA itself explicitly imposes a number of restraints on the Secretary's ability to proceed on an "interim" basis. For example, section 202(e)(2), 43 U.S.C. § 1712(e)(2), imposes procedural reporting requirements on the Secretary if he makes a management decision, as he has done here, that excludes mineral leasing for two or more years with respect to a tract of land of one hundred thousand acres or more.[2] The Secretary does not claim to have followed this law — to the contrary, the government's brief simply asserts he is not subject to it.

Second, the government contends that this Court's redressability test bars a plaintiff from possessing standing to challenge an illegal decision if the agency "would be free to decide not to lease the lands based on another, lawful ground." This argument was considered and expressly rejected in *Federal Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998) (quoted in Marathon's Petition at p. 20). If either the government or the Tenth Circuit chose to acknowledge the holding and binding effect of *FEC*, they would have to abandon their contention that this Court's redressability test is supposed to have the effect of insulating discretionary agency actions from review.

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2. It is notable that all of the "authority" cited by the government to support its proposition that FLPMA does not govern the Secretary's leasing decisions was decided before enactment of FLPMA.

Unfortunately, both the Tenth Circuit's decision and the government's argument choose to disregard the holding of *FEC*.

Third, the government's opposition brief defends the circuit court's contention that *Lujan II* and *Bennett* are "inapposite," by asserting that Marathon is not the "object" of the BLM's decision to withhold the lands nominated by Marathon from leasing. Its only basis for advancing this curious contention is that the BLM's "decision affects all companies that might have bid with (or outbid) petitioner for the property withheld from sale." This argument seeks to convert this Court's requirement that a plaintiff's injury must be "particularized" for it to have standing,[3] into one that requires the plaintiff's injury to be unique. There is no such standing requirement, nor is there any reason whatsoever for creating such a requirement.

In summary, each of the substantive responses made by the government to support the Tenth Circuit's decision in this case contradicts applicable authority. This is probably not an unprecedented circumstance, and by itself does not negate the government's contention that "this Court need not devote its time" to this case. What does negate that contention is the purpose behind the government's arguments. The government's expressed goal is to make all of the Secretary's leasing and, presumably, other land use decisions "not subject to judicial review." The government's analysis confirms that in the Tenth Circuit (which covers a large proportion of the public lands of this country) it has already made substantial progress toward reaching that goal.

In the face of these developments, only this Court can preserve the Constitution's delegation to *Congress* of the "power to dispose of and make all needful Rules and Regulations respecting the . . . property belonging to the United States."[4]

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3. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

4. U.S. Const. Art. IV, § 3, cl. 2.

Petitioner respectfully suggests that the task of preserving the Constitution's balance of powers among the three branches of government does indeed warrant the expenditure of this Court's time.

RIPENESS IS NOT AN ISSUE ON THIS RECORD

After asserting before the district court that "DOI agrees that the case is ripe for judicial adjudication, and DOI will not interpose the defense that Marathon failed to exhaust its administrative remedies," the Secretary argued to the circuit court that this case was not ripe for review. Marathon responded by pointing out that the factual record necessary to make a proper ripeness decision did not exist — it would have to be developed at the district court level before that issue could be properly addressed on appeal. The court of appeals based no part of its decision on ripeness grounds. This Court should do likewise.

The Secretary argues that he may raise a jurisdictional issue such as ripeness at any time in the proceedings. This argument misses the point. By not having raised the issue in the district court, the Secretary prevented any record from being developed on the issue. Accordingly, this Court does not possess the record that is necessary to make a determination of whether this case is ripe.

Implicitly acknowledging this problem, the Secretary sought to disguise it by tendering to the court of appeals a document entitled "Supplemental Appendix for Federal Appellees." The documents included in this "supplemental appendix" did not form part of the appellate record. They consisted, instead, of a partial selection of documentation post-dating the taking of the appeal. The government's opposition brief before this Court follows the same procedurally improper approach.

A large number of documents that bear on the issue of the current status of the Secretary's policy as it applies to these lands are missing from the government's Statement and "Supplemental Appendix" submitted to the court of appeals. One example consists of the documentation necessary to explain why the 1997 results of BLM's roadless review process concluded that many of the lands sought by Marathon are indeed "roaded," and unsuitable for wilderness, yet those same lands remain unavailable for lease today. Another example consists of documents that might explain why BLM has taken no action in response to the IBLA decision relied upon by the government.

Both before and after issuance of the IBLA decision, the BLM decision challenged by Marathon in this case has remained in full force and effect. No departmental review of the propriety of the Secretary's policy that prompted the BLM decision is under consideration, and the BLM's current actions, by its own admission, do not involve any efforts to change the policy or its specific current effects on lands sought by Marathon.

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Bennett v. Spear, 520 U.S. 154, 177-8 (1997) (citations omitted).

Rights and obligations of Marathon have been determined as a consequence of the Secretary's policy, and legal consequences (e.g. withdrawal of the lands sought by Marathon from lease sale, with consequent damage to Marathon) have

flowed. Under the BLM's own regulations, a policy established at the level of the Director or higher is final for purposes of judicial review.[5] Those same regulations specify that if a decision under appeal remains in full force and effect without being stayed for more than seventy-five days, then that decision becomes final for purposes of judicial review. 43 C.F.R. § 4.21(a) (1996). When the IBLA declared the decision to be improper, nothing happened to change the situation. Its practical effect remains the same as it has been since issuance — i.e. in full force and effect.

The appropriate response of an appellate court in these circumstances is to remand the ripeness question to the district court for proceedings to develop the needed facts. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 66-67 (1993).

CONCLUSION

The government's opposition brief posits that this Court's redressability test is meant to make illegal and procedurally flawed agency decisions non-reviewable by the courts if, following a judicial ruling setting aside such decisions, the agency "would be free to decide not to lease the lands based on another, lawful ground." The government's brief confirms that this proposition emerges from a line of Tenth Circuit cases, the latest of which is the decision at issue in this petition.

The government is utilizing the lower court decisions in this case to convert this Court's standing doctrine into a weapon that is radically altering the Constitution's delegation of powers between the executive and congressional branches of government in managing the public lands. Proof that this conclusion does not exaggerate the shift in powers that is

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5. 43 C.F.R. § 4.5 (1996). Marathon's Complaint alleges that the Secretary either imposed or approved the policy challenged in this action.

underway is provided by the government's opposition brief. In that brief the Secretary asserts flatly that his leasing decisions are not governed by the comprehensive policies set out in the Federal Land Policy and Management Act, and that no one has standing to challenge that assertion in court.

If in fact no one has standing to challenge the Secretary's assertions, then he will have succeeded in evading policy controls imposed on him in FLPMA. This Court should grant the petition to prevent that outcome.

Respectfully submitted,

CRAIG R. CARVER
Counsel of Record
DON H. SHERWOOD
ALFERS & CARVER, LLC
730 17th Street
Suite 340
Denver, CO 80202
(303) 592-7674

PATRICK G. PITET
Region Counsel
MARATHON OIL COMPANY
1501 Stampede Avenue
Cody, WY 82414-4721
(307) 527-3275

Attorneys for Petitioner